

June 17, 2010

Col. Jim Konrad, Director
Division of Enforcement
Minnesota Department of Natural Resources
500 Lafayette Road
St. Paul, MN 55155-4047

**RE: In the Matter of the Appeal of the Civil Penalty – Dogs Pursuing or Killing
Big Game – Issued to Jeffrey Anthony Mitchell; DNR TRANS CD 295;
OAH Docket No. 12-2000-21316-2**

Dear Col. Konrad:

On April 9, 2010, Conservation Officer Daniel J. Thomasen issued a Demand Letter for Payment of Civil Penalty to Jeffrey Anthony Mitchell alleging that he was the owner of a dog that killed a big game animal (a deer) and was therefore subject to a penalty of \$500 for violating Minn. Stat. § 97A.321.¹ In a letter postmarked April 24, 2010, Mr. Mitchell filed a timely appeal, pointing out that his dog did not kill the deer, a police officer did.²

Telephone hearings in this matter were held on May 25, 2010, and June 1, 2010. Mr. Mitchell and Conservation Officer Thomasen participated on both dates. Jon Heinzen, a witness to the dog attacking the deer, testified on June 1, 2020. The Department was allowed until June 4, 2010, to locate any case law on dogs injuring deer to the point of requiring the deer to be destroyed. On June 4, 2010, Conservation Officer Thomasen reported that the Department had been unable to locate any prior case law. The record was closed on June 4, 2010.

Minn. Stat. § 97A.321, subd. 1, states:

The owner of a dog that pursues but does not kill a big game animal is subject to a civil penalty of \$100 for each violation.

¹ Ex. 1.

² Ex. 2.

The owner of a dog that kills a big game animal is subject to a civil penalty of \$500 for each violation.

The term "big game animal" includes deer.³

In the early afternoon of April 6, 2010, Mr. Mitchell's dog attacked a deer in a wooded area in the City of Silver Bay. The area is south of Outer Drive, at or just west of the intersection of Horn Boulevard. The United Protestant Church is on the northwest corner of Outer Drive and Horn Blvd. The wooded area on the south side goes down to a creek. There was no snow on the ground at the time.

Jon Heinzen, a UPS driver, was driving his UPS truck along Outer Drive when he observed a dog bouncing up and down in the wooded area down below the edge of the slope. Because it looked so strange, he stopped and got out to look. He then saw a deer lift its head and realized that the deer was down and that the dog was pouncing on it and biting at its back. Mr. Heinzen yelled and the dog ran off. Mr. Heinzen reported the incident to Police Chief Ronald Johnson.⁴

At about 12:55 p.m. Chief Johnson arrived at the site. Charles Rathbone, who lives nearby, soon arrived and reported that he had observed a dog attacking the deer. At that time the deer was still alive and trying to stand, but was only able to get up once. The deer had been bitten deeply in its hamstrings and was bleeding badly from those bites.⁵ Hamstringing is an instinctual technique used by dogs, coyotes, and wolves to disable deer and other prey.⁶

About 1:00 p.m. Officer Mitch Dow arrived. The Police Chief determined that the deer would not survive and needed to be destroyed. So, Officer Dow retrieved a shotgun from his patrol car, returned, and shot and killed the deer. He soon returned with a four wheeler and disposed of the deer in the woods.⁷

About 1:30 p.m., Mr. Rathbone happened to observe the same dog in the parking lot of the Lounge, a nearby municipal liquor store. He reported that fact to the police. The police officers and Mr. Rathbone went to that location about 1:40 p.m. and spotted the dog near the Lounge. The dog was muddy and wet and bloody around its head and mouth. The officers tried, but were unable to catch it. It ran to a nearby shopping area parking lot where it approached two men near a Suburban. One of the men was Mr. Mitchell. The dog was his. He petted it and put it in his SUV.⁸

³ Minn. Stat. § 97A.015, subd. 3.

⁴ Testimony of Jon Heinzen.

⁵ Testimony of Jon Heinzen; Exhibit 4 (police reports); Exhibit 5 (photos of deer); Exhibit 7 (CO report).

⁶ Testimony of CO Thomasen and Jon Heinzen.

⁷ Testimony of Jon Heinzen; Exhibit 4 (police reports).

⁸ Exhibit 4 (police reports); Exhibit 6 (photo of dog).

Mr. Mitchell does not dispute that he owned the dog and that the dog attacked the deer. He argues that he should be liable at most for a fine of \$100 for his dog pursuing the deer, but not for a fine of \$500 because his dog did not kill the deer. Conservation Officer Thomasen suggests that the \$500 penalty is appropriate when a dog disables a deer by hamstringing it and injuring it to the point that it cannot survive and has to be destroyed.

The primary rule of statutory construction is that words and phrases are construed according to rules of grammar and according to their common and approved usage unless they are technical words and phrases that have acquired a special meaning or are defined in statute to have a special meaning.⁹

According to the Merriam-Webster Online Dictionary, “kill” in this context means:

1 a : to deprive of life : cause the death of **b** (1) : to slaughter (as a hog) for food (2) : to convert a food animal into (a kind of meat) by slaughtering

There is some merit to the argument that Mr. Mitchell’s dog did cause the death of the deer. It started the process of killing the deer. It was the only dog that attacked the deer. The dog pursued the deer, as demonstrated by the fact that the deer’s hamstrings had been severed by the dog’s bites and the dog was still pouncing on and biting the deer when it was frightened off by Mr. Heinzen. But the deer was still alive when the police intervened. The police made a determination that the deer could not “survive,” but that determination was somewhat speculative and in some part a determination that it could not survive in the wild. That determination was very likely correct. Nonetheless, it was the police officer’s shot that was the direct cause of the death of the deer.

The language of Minn. Stat. § 97A.321 itself is very instructive as to the Legislature’s intent. If a dog pursues a deer, but does not kill it, it is a \$100 penalty. If it kills it, it is \$500. The statute does state or imply any degree of injury short of death with terms such as “unable to survive,” “severely injures,” or “attempts to kill.”

Applying the clear language of Minn. Stat. § 97A.321, I conclude that Mr. Mitchell’s dog pursued, but did not kill the deer. Therefore, Mr. Mitchell is subject to a civil penalty of \$100 and not a civil penalty of \$500. I therefore recommend that the citation be **MODIFIED** to demand a civil penalty of \$100.

Pursuant to Minn. Stat. § 116.072, subd. 6(e), the Commissioner may not issue a final order in this matter until at least five days after receipt of this letter. Parties may send comments to the Commissioner on this recommendation during that five-day period and the Commissioner must consider such comments.

⁹ Minn. Stat. § 645.08(1).

Col. Jim Konrad
June 17, 2010
Page 4

Thank you. I am closing our file in this matter and returning the record to you.

Sincerely,

/s/ Steve M. Mihalchick

STEVE M. MIHALCHICK
Administrative Law Judge

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Digitally recorded, no transcript prepared.

cc: Jeffrey A. Mitchell
Conservation Officer Daniel Thomasen
Patricia Holt, DNR